STATE OF MICHIGAN

IN THE SUPREME COURT

* * * * * * * * * *

Appeal from the Court of Appeals

The Honorable Kurtis T. Wilder, the Honorable Joel P. Hoekstra
and the Honorable Donald S. Owens

* * * * * * * * * *

ANN and LEE COBLENTZ, and
JOHN and DEBORAH LEWANDOWSKI,

Plaintiffs-Appellants,

v.

CITY OF NOVI,

Defendant-Appellee.
_____/

Supreme Court No. 127715

Court of Appeals No. 255359
Lower Court No. 03-046760-CZ

BRIEF ON APPEAL/ APPELLE

ORAL ARGUMENT REQUESTED

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STATEMENT OF APPELLATE JURISDICTION

Defendant-Appellee does not dispute the jurisdiction of this Court. Plaintiffs-Appellants' Application for leave to Appeal was timely filed, and leave was granted by Order of this Court.

DATE AND NATURE OF ORDER APPEALED FROM

Plaintiffs appeal the November 23, 2004, Opinion of the Court of Appeals, Judges Kurtis T. Wilder (Judge Wilder), Joel P. Hoekstra (Judge Hoekstra), and Donald S. Owens (Judge Owens), to this Honorable Court pursuant to the provisions of MCR 7.302, *et seq*.

The unanimous Opinion of the Court of Appeals affirmed the decisions of Judge Fred M. Mester (Judge Mester) of the Oakland Circuit Court in this Freedom of Information Act (FOIA) case. Judge Mester entered judgment in favor of the City of Novi on Plaintiffs' claims alleging various violations of the FOIA. Several claims were resolved by summary disposition; one claim, involving a denial of Plaintiffs' request for documents submitted under a promise of confidentiality, was determined following an *in camera* consideration; a final claim, involving a fee charged for the review and separation of exempt from non-exempt material, was decided following an evidentiary hearing.

In a published opinion, the Court of Appeals unanimously affirmed the decision and judgment of Judge Mester. See *Coblentz v City of Novi*, 264 Mich App 450; 691 NW2d 22 (2004).

Plaintiffs seek to have the Opinion of the Court of Appeals reversed by this Court. Defendant, City of Novi, asserts that the Court of Appeals Opinion should be affirmed in all respects.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. WHETHER, AS A MATTER OF LAW, THE LOWER COURTS CORRECTLY DETERMINED THAT GRANTING THE CITY'S MOTION FOR SUMMARY DISPOSITION WITH RESPECT TO THE "INTENTIONALLY DELETED" EXHIBITS WAS APPROPRIATE.

Plaintiffs/Appellants answer: NO

Defendant/Appellee answers: YES

The Trial Court answered: YES

The Court of Appeals answered: YES

This Court should answer: YES

II. WHETHER, AS EVIDENCED BY THE UNREBUTTED AFFIDAVIT OF THE MAYOR OF THE CITY, NO "GLOBAL READINGS" OR "SITE PLANS" EXISTED AT THE TIME OF PLAINTIFFS' FOIA REQUEST, SUCH NONEXISTENCE OF A DOCUMENT BEING A PROPER BASIS FOR DENYING THE REQUEST; AND FURTHER, WHETHER THE CIRCUIT COURT'S EXERCISE OF DISCRETION IN PRECLUDING EXTENSIVE DEPOSITIONS SHOULD BE UPHELD, BECAUSE PLAINTIFF FAILED TO ARTICULATE ANY REASONS FOR SUCH DISCOVERY WHEN PROVIDED WITH THE OPPORTUNITY TO DO SO BY THE COURT, AND, MORE IMPORTANTLY, THE DEPOSITIONS AMOUNTED TO DISCOVERY FOR SUBSEQUENT LITIGATION.

Plaintiffs/Appellants answer: NO

Defendant/Appellee answers: YES

The Trial Court answered: YES

The Court of Appeals answered: YES

This Court should answer: YES

III. WHETHER THE "SIDE LETTERS" AT ISSUE ARE EXEMPT FROM DISCLOSURE UNDER MCL 15.243(1)(f).

Plaintiffs/Appellants answer:	NO
Defendant/Appellee answers:	YES
The Trial Court answered:	YES
The Court of Appeals answered:	YES
This Court should answer:	YES

IV. WHETHER, IN LIGHT OF THE ISSUES OF CONFIDENTIALITY THAT HAD TO BE RESOLVED USING THE SERVICES OF THE CITY ATTORNEY IN ORDER TO RELEASE ANY OF THE SO-CALLED "SIDE LETTERS," THE CITY PROPERLY CHARGED PLAINTIFFS A FEE ON THE BASIS THAT SUCH SERVICES COULD NOT BE PERFORMED BY ANY PERSON WHO WOULD BE COMPENSATED AT A LOWER RATE.

Plaintiffs/Appellants answer:	NO
Defendant/Appellee answers:	YES
The Trial Court answered:	YES
The Court of Appeals answered:	YES
This Court should answer:	YES

V. WHETHER A CITY ATTORNEY, EITHER "IN-HOUSE" OR RETAINED, IS AN EMPLOYEE OF A PUBLIC BODY FOR PURPOSES OF MCL 15.234.

Plaintiffs/Appellants answer:	NO
Defendant/Appellee answers:	YES
The Trial Court answered:	YES
The Court of Appeals answered:	YES
This Court should answer:	YES

INTRODUCTION

Plaintiffs submitted to the City of Novi two requests under the Freedom of Information Act (FOIA). At issue in this case is whether the City's responses to such requests were in compliance with the provisions of the FOIA. Avoiding all subtlety, Plaintiffs seek to paint with blatant assertions and unmistakable innuendo a very unsavory picture of the City, portraying it as uncooperative, secretive, even sinister its actions. If true, these claims and insinuations would depict a public body with heavy faults. It is fortunate, therefore, that Plaintiffs' "artistic" offerings actually paint a picture that bears no resemblance to reality.

- While Plaintiffs attempt to portray the City as uncooperative, the Court will find in the City's Counter-Statement of Facts a clarification that, in the absence of a FOIA request, and at no charge whatsoever, the City expeditiously provided in response to a series of informal requests by Plaintiffs' attorney literally hundreds of pages of documents.
- While Plaintiffs attempt to portray the City as sinister--meeting with Plaintiffs in the absence of legal counsel, "altering" Plaintiffs' FOIA request, and conveying street right-of-way in front of Plaintiffs' homes—the facts will show that, in its initial approach to the individual Plaintiffs relative to the waiver of potential deed restrictions, the City actually recommended that Plaintiffs secure the services of legal counsel (see, e.g., letter of August 26, 2002, to Plaintiffs Lewandowski, **Appellee's Appendix, 4b-8b**); that, in responding to Plaintiffs' FOIA request for "side agreements" in connection with the Sandstone settlement, rather than simply responding that there were no side agreements, the City clarified that there were "side letters," and that (as Plaintiffs well-knew) the City attorney was endeavoring to seek Sandstone's permission to release them (see e-mail from the City's counsel to Mr. Carson, Sandstone's counsel, dated November 11, 2002, **Appellant's Appendix, 485a**, followed by,

letter from City's counsel to Mr. Carson, Sandstone's counsel, dated November 26, 2002, **Appellee's Appendix, 12b-13b**); and that, with respect to the conveyance of street right-of-way on Plaintiffs' street, Dixon Road, in connection with the Sandstone settlement, the City conveyed land, but **not in front of Plaintiffs'** property, and, moreover, such conveyance was from the City ***to itself*** merely as a confirmation that such land was intended (as it had always been) for right-of-way purposes, all implicit in the settlement agreement (see quit claim deed of September 10, 2002, with attached map showing the conveyance to involve right-of-way which is not in front of Plaintiffs' residential parcels, **Appellee's Appendix, 9b-11b**).

- While Plaintiffs attempt to portray the City as secretive, quite the opposite has been true. The City initially negotiated a *concept* of a settlement with Sandstone Properties (including the intent to transfer some 75 net acres to Sandstone as part of the settlement) in order to resolve a pending Court of Appeals case and a money judgment against the City that had grown to greater than **$70,000,000.00.** Rather than secretly proceeding with such an arrangement, **the City Council sent a letter to every residence in the City explaining the intent and basic aspects of the settlement, and providing notice of the time, date, and place of a public hearing** on the proposed settlement concept. In addition, the City sent direct notices to owners of homes adjacent to the property to be transferred to Sandstone—**including the homes of Plaintiffs**—providing Plaintiffs with additional notice of the pubic hearing, and clarifying the point that, if approved, the settlement would include land use modifications applicable to property adjoining their homes. The notice was also published in the local newspaper. The hearing lasted several hours over the course of two evenings. Such extensive pubic notice and hearing on a proposed settlement is far in excess of the norm, and quite divergent from any notion of secretiveness.

Perhaps Plaintiffs have attempted to paint such a negative picture of the City in order to obscure attention from Plaintiffs' principal enterprise in its use of the FOIA in this matter. At the very outset of dialogue between the City's legal counsel and Plaintiffs' legal counsel—well before Plaintiffs' submission of a FOIA request—it was made clear by Plaintiffs' counsel that the primary focus of his inquiry was to discover facts that would support a money damage suit against the City; e.g., an inverse condemnation case resulting from the City's transfer to Sandstone of City-owned vacant land adjacent to Plaintiffs' property, apparently on the basis of some never-articulated entitlement on Plaintiff's part to continued use of the City's land for private aesthetic pleasure.

The first correspondence of the City's counsel to Plaintiffs' counsel, dated August 22, 2002 (**Appellants' Appendix, 204a-205a; Appellee's Appendix, 1b-3b**), includes the following statement to Plaintiffs' Counsel:

> You have indicated an intent to explore whether Mr. and Mrs. Coblentz have a cause of action against the City for what you characterize as a diminution in value to their property as a result of the Sandstone settlement. I certainly make no suggestion whatsoever that you should not explore such a cause of action, regardless of my opinion that such a cause of action does not exist.
>
> * * *
>
> In the mean time, I am providing you with citations to cases I believe to be relevant to your legal analysis on whether there is a cause of action against the City arising out of the settlement: *C. Murphy, M.D., PC v Detroit,* 201 Mich App 54 (1993) and *Spiek v Dep't of Transportation,* 456 Mich 331 (1998).

In letter correspondence from Plaintiffs' counsel to the City's counsel, dated December 16, 2002 (**Appellee's Appendix, 14b-15b**), Plaintiff's counsel stated:

> You indicated in our phone conversation, that the City was requesting a demand so as to preclude the loss of additional acres to Sandstone. We would like to take this opportunity to submit a **demand in order to settle all issues with both the City and Sandstone.**

> It is clear that a settlement with my clients would allow the City to retain the additional acres. Additionally, the City can utilize this property as a negotiating tool with Sandstone to finally conclude the "Sandstone nightmare" for the City of Novi. **By settling this matter with my clients, the City will obviate the necessity of potential litigation over causes of action for violations under the FOIA, the Open Meetings Act, Federal and State Statutes, Inverse Condemnation, and all costs and attorneys fees associated and wrongfully incurred by my clients.**
>
> * * *
>
> . . . in order to be made whole, I am hereby authorized, to sell to the City of Novi the title to the Coblentz and Lewandowski properties for the sum of one million two hundred thousand dollars ($1,200,000.00) each to the Coblentzs and Lewandowskis making a total of **two million four hundred thousand dollars ($2,400,000.00)**.
> [Emphasis supplied.]

In the FOIA litigation, the circuit court sent the parties to a Discovery Master to resolve a dispute concerning extensive written discovery submitted by both parties. Plaintiffs' characterize the meeting with the Master as involving a discussion with the Master on the subject of discovery. The actual meeting with the Master never involved *any* discussion on the merits of the discovery issues. Rather, the Master instantly recognized that there was no legitimate basis for not resolving the entire case; and, within not more than a few minutes, the Master had worked out a settlement in concept that appeared acceptable to both attorneys. The settlement was reduced to writing, a copy of which Plaintiffs took the liberty of disclosing to the circuit court

The settlement was very straightforward, and did not require Plaintiffs to make material sacrifice. So, why wasn't the settlement entered? The answer to this question reveals Plaintiffs overarching motive to continue discovery, searching for grounds for a money damage suit against the City. Examination of the settlement document (**Appellee's Appendix, 19b-24b**) reflects the inclusion of language insisted upon by Plaintiffs that further litigation against the City would be reserved. The settlement was ultimately rejected by Plaintiffs, however, because a termination of

this case would have undermined Plaintiffs' ability to **use the FOIA litigation as a vehicle for discovering a basis for a future money damage action**. Indeed, the refusal to settle was effectively accompanied by Plaintiffs' submission of a notice for **the deposition of ten City officials, and for the production of 85 documents.** Most of the officials sought to be deposed, and a great number of the documents sought, had no realistic connection—directly or indirectly—to the FOIA issues in the case.

It is the City's position in this case that the lower courts should be affirmed on the merits. In addition, this Court has clarified in connection with privacy issues under the FOIA that "**The only public interest in disclosure to be weighed . . . is the extent to which disclosure would serve the core purpose of the FOIA, which is contributing significantly to the public understanding of the operations or activities of government**. *Mager v Dep't of State Police*, 460 Mich 134, 145; 595 NW2d 142 (1999). Thus, the City respectfully prays that the Court will incorporate into its analysis and resolution of this case a *core purpose* analysis. The City does not expect the Court to read into the act the proposition that the FOIA, and litigation pursued under the FOIA, is not be used unless the information sought is within the core purpose of the FOIA. However, it would be most appropriate for the Court to restrict or even prohibit discovery in a FOIA case where such discovery seeks information for purposes associated with intended future litigation.

COUNTER-STATEMENT OF FACTS

A. Factual History Prior to Litigation

On or about January 21, 1999, Sandstone, a developer in the City of Novi, obtained a Judgment against the City pursuant to an Opinion and Order of the Oakland County Circuit Court in Civil Action Number 95-501532-CK. With interest and awarded costs and attorneys fees, the City calculated that, by June 2002, the amount owed under the Judgment, as the same had been amended

by the Court, was in the neighborhood of $70,000,000. An appeal from the Judgment was filed by the City and perfected, and briefs were filed.

Apparently as a result of actions leading to entry of the Judgment, a new Novi City Council was elected, and a new City administration was appointed. With such significant changes in place, negotiations with Sandstone to settle the litigation were then opened in earnest.

The City was without the necessary cash to effectuate a mutually agreeable settlement and, in discussions with Sandstone, the City was informed that Sandstone refused to accept a promise of future payment to fund a compromise settlement of the case; rather, Sandstone insisted upon a settlement immediately making provision for the transfer of valuable consideration. The City's only available means of settling the case contemplated, in good part, the transfer of City-owned land to Sandstone.

An Amended Judgment embodying a settlement between the parties was negotiated over a period of many months. The Amended Judgment was intended to supersede the earlier Court-imposed Judgment. Among other things, the City would be obligated under the settlement to make a "Land Advance," contemplating that Novi would cause 75 "net usable" acres (the "75 Acres") to be conveyed to Sandstone. Sandstone, in turn, would then be entitled to develop the 75 Acres in accordance with the specifications agreed upon as part of the settlement. A portion of the 75 Acres is adjacent to the properties of Plaintiffs in this case.

The City Council's deliberations with regard to such a proposed settlement included the distribution of a letter throughout the City outlining the proposed settlement of the *Sandstone* case. The City Council determined that such settlement should be undertaken only in the light of day. As noted above in the Introduction, the City sent notice to every household in the City explaining the proposed settlement concept and providing notice of a public hearing on the settlement. In addition,

a separate notice of the public hearing was also sent directly to the Plaintiffs in this case, clarifying that the settlement, if approved, would include new land use guidelines applicable to property adjoining their homes. The City Council conducted two evenings of public hearings. This was followed by extensive preparation of final settlement documentation.

Finally, on or about June 25, 2002, Sandstone and the City entered into a settlement agreement of historic proportion for the City, entitled "Agreement for Entry of Consent Judgment," and dated June 25, 2002, which is a lengthy document, with numerous exhibits (see text of Agreement, **Appellants' Appendix, 18a-70a**). The Agreement, in part, authorizes development of certain land that is adjacent to that owned by Plaintiffs in the present case.

If the City had been unsuccessful in the litigation and settlement, it would have been necessary to satisfy the total judgment, which, in turn, would most likely have required the issuance of a judgment bond, to be paid for by the assessment of each and every taxable property in the City. The assessment would have been in a material amount (several hundred dollars annually for the average household), and the assessment would have extended over the course of 15 to 20 years. This would have been devastating enough to all residential property owners in the City. But it would also have had ramifications beyond imagination on the decisions of business owners, managers, and investors considering whether to locate office, commercial, and industrial facilities within the City. The fact that in comparison to other competitive cities, tens of thousands—perhaps hundreds of thousands—of property tax dollars would have to be expended solely to pay this Judgment incurred in the past, would undoubtedly have affected the City's "competitive" position.

Soon after June 25, 2002, the City made contact with Plaintiffs in this case in pursuit of the *Sandstone* settlement implementation. The explanation for such contact arises out of a commitment for a title policy for the 75 Acres, secured in connection with the final documentation for the

settlement. The title policy revealed that there were certain deed restrictions on properties in the area. The City and Sandstone had concluded that a legal argument might be advanced under the "negative reciprocal covenant" doctrine that, if accepted, might preclude Sandstone from developing the Property transferred in the settlement in the precise manner authorized under the Agreement with the City. Sandstone became concerned that the adjoining property owners (including the Plaintiffs in this case) might try to prevent particular uses of a portion of the 75 Acres, although such uses otherwise were authorized in the settlement agreement with the City.

In light of this possible deed restriction issue, Sandstone and the City negotiated a resolution incorporated as part of the June 25, 2002, Settlement Agreement. The resolution fashioned for this purpose established for the City a brief "window in time" to clear up the restriction issue. If the City was unable to clear up the restriction issue, the City would be obligated to ***convey additional land to Sandstone*** (i.e., land in addition to the 75 acres). Part 3.E. of the Settlement Agreement sets forth the specific negotiated resolution on the issue (**Appellants' Appendix, 27a-29a**):

> City shall be granted a period of six (6) months following the entry of the Consent Judgment to cause the Restrictions to be discharged, waived or removed of record . . . . If City fails to obtain the Restrictions Discharge within such six (6) month period then City, at the option of Sandstone, and in release of any further obligations of City to remove the Restrictions (the "Deed Restriction Option") exercised by written notice by Sandstone to City within two (2) years following such six (6) month period, shall . . . convey by warranty deed to Sandstone, and provide the title work and clean environmental certifications as provided for the Property, for either:
>
> (i) 4.8 acres of the Additional Land designated by Sandstone and contiguous to its Property; and if Sandstone elects this subparagraph (i) option it shall be free to develop the Property for all uses provided in this Agreement; or, in the alternative,

(ii) 9.6 acres of the Additional Land designated by Sandstone and contiguous to its Property; . . . [with other stipulations being provided].

As owners of property that might be in a position to enforce the alleged deed restrictions under the doctrine of "negative reciprocal covenants," Plaintiffs were contacted by the City with the view toward seeking a release of the restrictions. In making such contact, the City recommended to Plaintiffs that it would be in their interest to bring in legal counsel on their behalf. Counsel for Plaintiffs was thus engaged.

Plaintiffs' attorney began making lengthy requests for documents relating to the Sandstone Settlement Agreement. On August 22, 2002, in response to Plaintiffs' attorney's first "general" request for documentation ("general" meaning not specifically made under the FOIA), the City Attorney immediately provided the following, **at no cost to Plaintiffs (Appellants' Appendix, 204a)**:

1. City Zoning Ordinance.
2. Minutes of Planning Commission meetings relative to the amendment of the Master Plan.
3. Minutes of City Council meetings in which there were discussions in open session relative to the Sandstone settlement involving the transfer of the park property.
4. Copy of the Settlement Agreement itself.

Shortly thereafter, on August 28, 2002, Plaintiffs' attorney requested a considerable amount of additional information and the City immediately provided this information, again **at no charge to Plaintiffs**, including a copy of the so-called "Regulations" exhibit to the Settlement agreement. Also on that date, in response to another general request by Plaintiffs' attorney, the City provided the following additional documentation **at no cost to Plaintiffs**:

1. Warranty Deed from Resco/Novi Venture, Inc. dated February 18, 1993 for parcel number 50-22-10-300-001.
2. Stipulated Order Vesting Title and for Release of Estimated Just Compensation entered January 11, 1994 and recorded September 27, 2001 in Oakland County Circuit Court Case No. 93-465090-CC. This is for parcel number 50-22-10-300-002.

3. Warranty Deed from Mr. and Mrs. Pollard and Mr. and Mrs. Dillon to the City of Novi and a title policy for the same. This is for parcel number 50-22-10-300-003.
4. Warranty Deed from Mr. and Mrs. Bech to the City of Novi.
5. Warranty Deed from Dolores Gasior as Trustee for parcel number 50-22-10-300-005.
6. Warranty Deed, title policy and survey for the property deeded by Novi-Twelve Associates to the City of Novi on January 14, 1997 for parcel number 50-22-10-300-006.
7. Warranty Deed and title policy for property deeded by Alli Adams to the City of Novi on February 28, 1996. This is for parcel number 50-22-10-300-007.
8. Stipulated Order Vesting Title, Possession and for Payment of Estimated Compensation in Oakland County Circuit Court Case No. 98-006420-CC for the property owned by Robert LaReau and Marcella LaReau. This Order was recorded on September 30, 1998 and is for parcel 50-22-10-300-012.

On August 30, 2002, responding to yet another new general request from Plaintiffs' attorney, the City provided the following additional documentation, **without cost to Plaintiffs**:

1. Master Plan and Zoning Committee Minutes dated December 21, 2001
2. Minutes of the December 19, 2001, regular meeting of the Novi Planning Commission.
3. Minutes of the January 9, 2002, regular meeting of the Novi Planning Commission
4. Minutes of the October 1, 2001, regular meeting of the Council of the City of Novi
5. Minutes of the October 15, 2001, regular meeting of the Council of the City of Novi
6. Minutes of the February 23, 2002, special meeting of the Council of the City of Novi
7. Minutes of the June 24, 2002, special meeting of the Council of the City of Novi
8. Zoning Ordinance of the City of Novi
9. City of Novi 2020 Master Plan for Land Use
10. City of Novi Zoning District Map

The August 30, 2002 transmittal of documentation was accompanied by the following additional note as part of a letter from the City Attorney:

> . . . In your letter of August 29, 2002, you request a copy of a "project plan;" however, this is merely a reference to a concept, and not to a document.
>
> With regard to the other Exhibits to the Agreement, because the Agreement and Exhibits represent some three or four inches of paper, including some large maps that would have to be sent out for copying, I invite you to come to my office to examine the entire booklet. I would then provide you with copies of the documents you determine to be relevant to your review.

> Look forward to hearing from you on or before noon on September 9, 2002 with regard to your client's position on the offer to pay $15,000 in consideration for execution of the Release.

On one day's notice, Plaintiffs' attorney appeared at the City Attorney's office on September 4, 2002, and was given the City Attorney's copy of the Agreement for Entry of Consent Judgment, together with the exhibits to the Agreement. Plaintiffs' attorney was provided with a conference room, with the direction that copies of documents would be made for him upon designation of desired materials.

On the same date (September 4), the City Attorney provided Plaintiffs' attorney with a written clarification relative to certain "intentionally deleted" exhibits, as follows: "It is true that there was a note in the Agreement and exhibits that certain exhibit letters, e.g., Exhibit G, had been intentionally deleted. Such indication was made in order to clarify that such lettered exhibits do not exist. Thus, it is not the case that exhibits that do exist were not made available for your review." (See affidavit of Gerald A. Fisher, **Appellants' Appendix, 486a-488a**)

On that same date, unknown to the City Attorney, Plaintiffs' attorney also appeared at the City Clerk's office and presented a FOIA request for the "intentionally deleted" exhibits, along with other materials (Appellants' Appendix, 80a). [This was the first of two FOIA requests.] Plaintiffs' request specifically asked for "all exhibits, including but not limited to exhibits G, P, U, V, W, AA, BB, GG, MM, NN, and PP, for the Agreement for Entry of Consent Judgment dated June 25, 2002 between Sandstone and the City of Novi."[1] In response to this request, Plaintiffs' attorney was provided with the following on September 26, 2002 (**Appellants' Appendix, 92a-93a**):

[1] In their Brief to this Court, Plaintiffs accuse the City of "altering" Plaintiffs' FOIA request. Such an accusation is quite unfounded, as briefly explained in the Introduction. With regard to the documents at issue, the City has, throughout

1. Exhibits G, T, U, V, W, AA, BB, GG, MM, NN, PP: I have advised you by phone and letter that there are no such exhibits. The reference in the index, indicating that they were intentionally deleted, is merely to clarify for the reader that such exhibits have not been lost or detached from the Agreement. These exhibits do not exist, and never existed.

2. Site Plan: I have also advised you by phone and letter that a site plan or concept plan for the 75 acres does not exist. It has never existed. I do not know how to provide any further explanation.

3. Title Commitments: Enclosed is the final title commitment (to the best of my knowledge) with regard to the 75 acres. This document will constitute the final Exhibit N, as referenced in your letter.

On October 3, 2002, the City Attorney wrote to Plaintiffs' attorney (See generally, **Appellants' Appendix, 101a**):

> You have now requested "drafts of the Agreement", making reference to the Settlement Agreement between the City and Sandstone. I have advised you that there were numerous drafts, and that this is a lengthy document. Under these circumstances, I would be more than happy to have you come over to my office and review these drafts of Agreements to determine whether any information of value can be found. If you insist upon copies of all of the Agreements, I will certainly provide them to you. However, I am certain the City will require copying charges, which will be considerable. Therefore, if you desire copies of multiple old drafts of the Agreement, I will respectfully request your advanced confirmation that you will be willing to make payment for them at the rate of $.20 per page. With regard to the site plan and the photograph exhibits, I have provided an extensive explanation to you on these points. The "65,000 square feet" was a negotiated number.
>
> Relative to title commitments, I am enclosing with this letter copies of earlier drafts of the title commitments dated January 9, 2002, July 15, 2002, and August 30, 2002.

Based upon another new general request, on October 21, 2002, the City Attorney transmitted to Plaintiffs' attorney, **without charge**, 67 pages of materials marked by Plaintiffs' attorney while

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these proceedings, fully acknowledged what Plaintiffs' were seeking through their FOIA requests and with regard to

inspecting the numerous copies of the draft agreements collected and assembled by the City Attorney and made available for review (**Appellants' Appendix, 101a**). The City Attorney indicated to Plaintiffs' attorney at that time that he did not know what Plaintiffs' attorney intended by requesting a "Global," and also indicated that, in response to his request for side letters, it would be necessary for the City's counsel to consult with legal counsel for Sandstone in view of the fact that certain of the documents had been submitted with an understanding of confidentiality.

Plaintiffs' counsel and the City's counsel had been in a dialogue with regard to production of a set of side letters executed to achieve finalization of the Settlement Agreement between Sandstone and the City, and submitted to the City under a promise of confidentiality. Negotiations to this effect between the City and Sandstone were very close to fruition (see e-mail from the City's counsel to Mr. Carson, Sandstone's counsel, dated November 11, 2002, **Appellants' Appendix, 485a**). Such efforts ultimately led to an understanding authorizing the release of five of a total of seven side letters (*see* letter from City's counsel to Mr. Carson, Sandstone's counsel, dated November 26, 2002, **Appellee's Appendix, 12b-13b**).

Unfortunately, the City's counsel was not given the time by Plaintiffs' counsel to complete negotiations with Sandstone's legal counsel to release the side letters. Plaintiffs' attorney submitted a **second FOIA request** to the City on November 1, 2002, seeking considerable additional information, including "any and all side agreements." (**Appellants' Appendix, 102a**.) Neither the City nor its counsel had documents identified by them as "side agreements." However, rather than merely responding with a general denial of the request, the City attempted to comply with the request for what it (correctly) interpreted Plaintiffs' desire to receive—"side letters." A response was made to the November 1, 2002, FOIA request, and all but two (of seven) of the "side letters" relating to the Settlement were furnished. As to the two retained side letters, it was clarified in

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many of the documents has continuously stated that said documents do not exist.

writing that they fell under an express confidentiality exception provided for in the Act (**Appellants' Appendix, 112a-115a**).

Plaintiffs then filed this suit. Among the specific requests in the Complaint, Plaintiffs sought:

- Production of the several so-called "missing" exhibits, which do not exist. The suit suggests that one of the non-existent exhibits "AA," is attached to the complaint. Plaintiff's attorney had the Settlement Agreement since August, 2002, and obviously recognized that there is no reference whatsoever to an Exhibit AA in the Agreement, and that the document attached to the complaint was something prepared during the eighteen months of negotiations, but never used. Therefore, what is attached to the Complaint as Exhibit AA never existed ***as an actual exhibit*** to the one and only Settlement Agreement of June 25, 2002, which is what was requested in the attorney's FOIA letter. As an aside, it is worthy of note that the attorney never bothered to ask for an explanation with regard to this Exhibit AA.

- Production of all "side agreements" (side letters), which have been provided. The City had provided all but two of such documents; the two having been provided to the City under confidence, and falling within the confidentiality exception of the Act.

- Production of "Global Readings," which do not exist.

- Production of "site plans," which do not exist in terms of any record in the possession of the City.

B. Factual and Procedural History in the Circuit Court

Shortly after the City filed its Answer, the parties submitted written discovery in the form of Interrogatories and Requests for Admission. Thereafter, disagreements between the parties concerning such discovery arose. This led to a hearing before the trial court and to that court's appointment of a Master to make recommendations concerning the discovery requests (**Appellants' Appendix, 314a; Appellee's Appendix, 16b-18b**).[2]

A meeting with the Master occurred on April 17, 2003. Discussions at this meeting, however, were not focused upon a resolution of discovery issues. As reflected in the transcript of a hearing before the circuit court on August 13, 2003 (**Appellants' Appendix, 475a**), it took the

Master only about "30 seconds" to direct the parties toward a proposed settlement of the entire case. (**Appellants' Appendix, 479a**). In fact, a concept of settlement was reached with the Master, and the parties proceeded with the preparation and negotiation of a document reflecting the settlement. Plaintiffs took the liberty of submitting to the Court a copy of the draft of settlement reached to dismiss this case. (**Appellee's Appendix, 19b-24b**) After an apparent change of heart, rather than finalizing the settlement of the pending FOIA case, Plaintiffs chose instead to continue the vehicle of the FOIA case as a means of conducting discovery for their hoped-for money damage case against the City.

As noted in the Introduction, *supra*, Plaintiffs had submitted an earlier $2,400,000.00 demand letter. While the parties had agreed in the proposed settlement order to reserve the right for Plaintiffs to file a subsequent case, that, apparently, was not as attractive to Plaintiffs as using the FOIA case for further pre-suit discovery for their planned money damage claims. This is no supposition, since shortly following their refusal to finalize the settlement, Plaintiffs submitted a Notice of Taking Depostions Duces Tecum (**Appellants' Appendix, 319a**), setting the deposition of ten City officials, and requiring the production of eighty five (85) documents—most of which had no relation to the FOIA issues, but rather went to the substance of the effect of the Sandstone settlement on their property. While Plaintiffs now claim they should have been provided with the right to undertake further discovery, they refused to return to the Court's appointed Master in order to resolve the discovery issues on the interrogatories and requests for admissions.[3]

[2] Plaintiffs attempt to paint this picture that they are simply innocent property owners and the City is involved in some sort of cover-up. Such is not the case.

[3] The City notes that on pg. 10 of Plaintiffs' Brief, Plaintiffs reference certain photographs of the subject property and notes that work was being performed on the property. The City has already filed a motion to strike these photographs from the record; the City again notes that these photographs and any activity that was occurring on the property at that time are not and were not relevant to the case at hand or Plaintiffs' FOIA request.

The City filed a Motion for Summary Disposition on August 12, 2003, addressing all claims raised in Plaintiffs' complaint (**Appellee's Appendix, 25b-57b**). The City's motion was supported by affidavits (**Appellee's Appendix, 25b-57b**). One of the affidavits filed in support of the motion was the affidavit of the Mayor of the City, Richard Clark (**Appellee's Appendix, 58b-59b**). The substance of Mayor Clark's affidavit reads as follows:

> *I, Richard J. Clark, Mayor for the City of Novi, being first duly sworn, state the following based upon his best knowledge, information, and belief, and if called to testify at trial would testify as follows:*
>
> 1. *I am the Mayor for the City of Novi ("City") and I make this Affidavit in such capacity.*
>
> 2. *I personally participated in a number of meetings leading to the Agreement for Entry of Consent Judgment dated June 25, 2002 ("Agreement").*
>
> 3. *Plaintiffs have requested production of "any and all site plans from Sandstone regarding the 75 dedicated acres". While it is clearly the understanding and intent of the Agreement that Sandstone, or its successors, would submit site plans in the future, no such site plans for the so-called 75 acres have ever been presented by Sandstone to the City.*
>
> 4. *Plaintiffs have requested production of "global readings on the 'extra land '; or global positioning satellite (GPS) readings on the 'extra land'". According to a review of City records, there are no such documents utilized by the City negotiators or City Council in connection with the Agreement for Entry of Consent Judgment, dated June 25, 2002, or the Consent Judgment entered in connection therewith, and Affiant does not believe that, during the entire course of discussions leading to the Agreement that such global readings on the extra land; or global positioning satellite (GPS) readings on the extra land, were ever discussed or presented to the negotiators of the settlement and/or to the City Council for consideration.*

Plaintiffs filed a response to the motion on September 4, 2003. **No counter-affidavit was submitted by Plaintiffs. Nor did (or could) Plaintiffs point to any basis in their pleadings, or provide any other credible evidence, to rebut the Mayor's Affidavit**. Again, Plaintiffs now argue that their depositions should have been permitted. However, when the circuit court questioned counsel for Plaintiffs on what they intended to ascertain by such depositions, the transcript of the

August 13, 2003, hearing (**Appellants Appendix, 478a)** reflects **only** a reference to securing information on the so-called intentionally deleted exhibits—a matter that exclusively presents a **question of law** involving the interpretation of the scope of Plaintiffs' FOIA request (to be discussed at length in Argument II, *infra*).

On October 22, 2003, after hearing argument from both sides on the City's motion, the circuit court, ruling from the bench, granted the motion relative to some of the records sought by Plaintiffs in their FOIA request.

- With regard to the intentionally deleted exhibits G, P, U, V, W, AA, BB, GG, MM, NN, and PP, the court granted the motion that had argued as a matter of law that such draft exhibits were not within the scope of Plaintiffs' FOIA request (**Appellants' Appendix, 329a-344a**), which had requested **the** Agreement, dated June 25, 2002 (and not exhibits that may have been contemplated for ***unapproved drafts*** of the Agreement). Thus, the court found such exhibits to be "irrelevant" to the FOIA request; i.e., that they were outside the scope of information requested in Plaintiffs' FOIA letter.

- With regard to the "site plans" and "global readings," the Court determined that Plaintiffs had produced no credible evidence to rebut the Mayor's affidavit which clarifies their non-existence (**Appellants' Appendix, 329a-344a**).

- On the issue of the "side letters" submitted by Sandstone under a promise of confidentiality, the court referred such issue for an *in camera* review as requested by the City, the proceedings for which the court immediately initiated. *Id.*

- And finally, with regard to the issue of whether the City had properly charged Plaintiffs for responding to their FOIA request (in addition to the hundreds of documents produced at no charge), the court determined that an evidentiary hearing would be required. *Id.*

The court commenced the *in camera* review of the two so-called "side letters" without delay. For this purpose, the court conducted an initial meeting of the parties, as well as the attorney for Sandstone, on October 23, 2003 (**Appellants' Appendix, 345a-370a**). Pursuant to the understanding reached at the October 23, 2003, meeting, the City submitted the subject "side letters" to the court in a sealed envelope. Plaintiffs, the City, and legal counsel for Sandstone (who was invited specifically by the court to participate in this investigation in view of Sandstone's obvious

interest in maintaining the confidentiality of the documents) all submitted memoranda to the court (see **Appellee's Appendix 65b-95b [the City's memorandum]; Appellee's Appendix 96b-104b [Brief of Non-Party Sandstone]**). To reiterate, the circuit court specifically invited the attorney for Sandstone to make a submission concerning the "side letter" because the court found Sandstone to be vital party (**Appellants' Appendix, 345a-370a**).

The City's submission for the *in camera* review included a memorandum (**Appellee's Appendix, 65b-95b**), accompanied by the affidavit of Gerald A. Fisher, and affidavit of the City Clerk, Maryanne Cornelius, with attachments (**Appellee's Appendix 60b-64b**), which, in substance, included the following:

> *MARYANNE CORNELIUS, being first duly sworn, deposes and states the following based upon her personal knowledge and to the best of her information and belief:*
>
> *1. I am the Clerk of the City of Novi, and make this affidavit in that capacity.*
>
> *2. On or about June 25, 2002, the City entered into a settlement agreement, entitled Agreement for Entry of Consent Judgment. This Agreement related to outstanding litigation in the Oakland County Circuit Court in Case No. 95-501532-CK, between the City of Novi and Sandstone Associates.*
>
> *3. On or about July 24, 2002, the Circuit Court for the County of Oakland entered a Consent Judgment in such case in accordance with the Agreement for Entry of Consent Judgment.*
>
> *4. Subsequent to entry of the Consent Judgment with the Court, the Novi Clerk's Office received two requests under the Freedom of Information Act ("FOIA"), filed by Gary A. Rossi. The second such request, made on or about November 1, 2002, sought, among other things, "Any and all side agreements entered into between the City of Novi and Sandstone and/or its attorneys or representatives."*
>
> *5. It is my understanding and belief that, in response to such FOIA request, in view of what appeared to be the confidential nature of certain of the side letters (referenced in the FOIA request as side agreements), the City Attorney attempted to work out an agreeable arrangement with the attorneys for Sandstone with regard to the disclosure of such documents.*

6. *While it is my understanding that the attorneys for Sandstone initially took the position that all of the side letters were confidential, and could not be disclosed, the City Attorney ultimately worked out an understanding with Sandstone's attorney, Robert M. Carson, that only two of such letters would be required to be withheld from disclosure (see letter from City Attorney, Gerald A. Fisher, dated November 26, 2002, attached to this Affidavit).*

7. *On or about the same date that such determination and agreement was reached with regard to which of the side letters would be deemed confidential under the FOIA, i.e., November 26, 2002, a document was prepared, entitled, SETTLEMENT IN OAKLAND COUNTY CIRCUIT COURT LITIGATION WITH SANDSTONE, DESCRIPTION OF INFORMATION PROVIDED TO CITY UPON PROMISE OF CONFIDENTIALITY PURSUANT TO MCL 15.243(g) [now codified as MCL 15.243(f)], and such document has been on file in my office since November 26, 2002. A copy of such document is attached and incorporated as part of this Affidavit.*

8. *To the best of my knowledge and information, no person has, either before or after November 26, 2002 until the present date, made a request for the description of the information, as entitled and described in paragraph 7, above.*

Sandstone also submitted the affidavit of Ronald Hughes attesting to the fact that the letters were confidential and that confidentiality was assured by the Mayor and City Manager (**Appellee's Appendix 105b-107b**).

The court entered its Opinion and Order concerning the *in camera* review on December 19, 2003, with appropriate findings, concluding that the City properly denied Plaintiffs' FOIA request with regard to the two side letters because they were exempt from disclosure (**Appellants' Appendix, 5a-6a**). Thereafter, on January 27, 2004, the court entered an order, and then an amended order, memorializing the October 22, 2003, ruling from the bench, granting the City's Motion for Summary Disposition, in part (**Appellants' Appendix, 7a-9a**).

With regard to the issue of fees charged to Plaintiffs in connection with their FOIA requests, the court held an evidentiary hearing on March 22, 2004. At the conclusion of the hearing, the court held that the fees charged were permissible under the law (**Appellants' Appendix, 390a-467a**).

Plaintiffs thereafter filed motions for reconsideration on the grant of summary disposition and on the ruling based upon the *in camera* consideration. The final order in this matter, which resolved the last issue in the case, was the "Order Denying Plaintiffs' Motions for Reconsideration and Determination of Appropriateness of Attorney Fee Charged Under the FOIA," entered on April 21, 2004 (**Appellants' Appendix, 10a-11a**).

On May 4, 2004, Plaintiffs filed a Claim of Appeal as of right with the Court of Appeals. Following the submission of briefs and oral argument, the Court of Appeals (Judges Kurtis T. Wilder, Joel P. Hoekstra, and Donald S. Owens) issued an opinion affirming the trial court's decisions (**Appellants' Appendix, 12a-17a**).

On December 29, 2004, Plaintiffs filed an Application for Leave to Appeal to this Honorable Supreme Court, which this Court granted on October 19, 2005.

ARGUMENT

I. AS A MATTER OF LAW, THE LOWER COURTS CORRECTLY DETERMINED THAT GRANTING THE CITY'S MOTION FOR SUMMARY DISPOSITION WITH RESPECT TO THE "INTENTIONALLY DELETED" EXHIBITS WAS APPROPRIATE. THESE PURPORTED EXHIBITS WERE NOT PART OF "THE" AGREEMENT OF JUNE 25, 2002, AND PLAINTIFFS' FOIA REQUEST UNAMBIGUOUSLY REQUESTED COPIES OF "THE" SETTLEMENT AGREEMENT OF JUNE 25, 2002. TO THE EXTENT SUCH EXHIBITS MIGHT (OR MIGHT NOT) HAVE BEEN CONTEMPLATED BY THE PARTIES AS PART OF PRIOR DRAFTS OF "THE" AGREEMENT, PLAINTIFFS' REQUEST FOR "THE" AGREEMENT CREATED NO LEGAL DUTY TO PRODUCE THEM.

Under the FOIA, an individual has the right to inspect, copy, or receive copies of a public record after providing the public body's FOIA coordinator with a "**written request that describes a public record sufficiently to enable the public body to find the public record.**" See MCL 15.233(1); *Thomas v New Baltimore*, 254 Mich App 196; 657 NW2d 530 (2002). However, with

certain exceptions, the act does not require a public body to create a new public record. See MCL 15.233(5).

Plaintiffs' FOIA request on this issue asked for "all exhibits, including but not limited to exhibits G, P, U, V, W, AA, BB, GG, MM, NN, and PP, for ***the*** Agreement for Entry of Consent Judgment dated June 25, 2002 between Sandstone and the City of Novi" (**Appellants' Appendix, 80a**) (Emphasis Supplied). There is only **one** Agreement for Entry of Consent Judgment dated June 25, 2002, between Sandstone and the City of Novi. While legal counsel for the City and Sandstone had worked through numerous drafts of the agreement, and while one or more parties or their counsel might well have contemplated at some point a reference to respective exhibits shown in the table of contents to be "intentionally deleted," at the end of the day, such other drafts and exhibits were not all made a part of **the one and only** Agreement for Entry of Consent Judgment dated June 25, 2002, and were not approved by either the City or Sandstone. Some of the exhibits sought by Plaintiffs may never have existed, and others may have been created, but later discarded in the process of finalizing the one and only Agreement dated June 25, 2002.[4] Thus, such intentionally deleted exhibits were not within the unambiguous language of Plaintiffs' FOIA request.

If a document's language is clear, interpretation is limited to the actual words used. *Burkhardt v Bailey*, 260 Mich App 636; 680 NW2d 453 (2004). Plaintiffs' contention in this appeal is that the City should have gone *beyond the plain and unambiguous language of the FOIA request.* That is, according to Plaintiffs, the City had the obligation to respond to their FOIA request by

[4] To illustrate, during the long process of negotiating the Agreement, there may have on any given day been the intent to insert a given exhibit at a particular point in the draft agreement. As negotiations progressed, and the draft agreement was changed in various respects. Some exhibits were ultimately utilized as anticipated, while others were discarded as being unnecessary or inappropriate in view of changes in the text of the Agreement, while still others were inserted in a different location. Moreover, various exhibits that were contemplated during the course of negotiations may not have been prepared until the negotiations were substantially complete, and there was confirmation that the exhibit would in fact be used. In other words, an exhibit may not have been prepared or inserted until necessary—and in fact in some cases might never have even been prepared. This is why exhibit letters were given to documents that may have never

including certain documents that correspond with the letters G, P, U, V, W, AA, BB, GG, MM, NN, and PP, even though such alleged "documents" were not exhibits ***for "the" June 25, 2002, Agreement***. A review of the text of the June 25, 2002, Agreement shows no citation to these "intentionally deleted" exhibits. Plaintiffs asked in their FOIA request for the exhibits for the June 25, 2002, Agreement, and they received the exhibits **for the June 25, 2002 Agreement**. That is all the FOIA requires.

Plaintiffs asked for certain exhibits "for" the June 25, 2002, Agreement. The word "for" is defined as "used to indicate the object, recipient or aim of an act or activity" and "use to indicate a destination." See *Webster's New Riverside Dictionary*, p 271. The June 25, 2002, Agreement does not contain exhibits G, P, U, V, W, AA, BB, GG, MM, NN, or PP. Such alleged documents were not "exhibits for" the June 25, 2002, Agreement.

Plaintiffs argue that the FOIA provides no exemption for the "intentionally deleted" exhibits; however, there is no issue as to whether these "documents" are exempt. The "intentionally deleted" exhibits simply and as a matter of law were not within the scope of Plaintiffs' FOIA request. Therefore, they need not be produced in response to such request.

The City turned over exactly what Plaintiffs requested—the exhibits "for" "the" June 25, 2002, Agreement. The FOIA requires nothing more and nothing less. Summary disposition was properly granted.

existed. Thus, rather than re-sequencing the exhibits during every draft, the drafters simply left the lettering in place and deleted the letters relative to the exhibits being discarded.

II. AS EVIDENCED BY THE UNREBUTTED AFFIDAVIT OF THE NOVI CITY MAYOR, NO "GLOBAL READINGS" OR "SITE PLANS" EXISTED, AND THE NONEXISTENCE OF A DOCUMENT IS A PROPER BASIS FOR DENYING A FOIA REQUEST. MOREOVER, THE CIRCUIT COURT'S EXERCISE OF DISCRETION IN PRECLUDING EXTENSIVE DEPOSITIONS SHOULD BE UPHELD BECAUSE PLAINTIFF FAILED TO ARTICULATE ANY REASONS FOR SUCH DISCOVERY WHEN PROVIDED WITH THE OPPORTUNITY TO DO SO BY THE COURT, AND, MORE IMPORTANTLY, IN VIEW OF THE FACT THAT THE DEPOSITIONS AMOUNTED TO DISCOVERY FOR SUBSEQUENT LITIGATION.

A FOIA requester need not describe with absolute specificity the information that is sought. See *Herald Co v Bay City*, 463 Mich 111, 122; 614 NW2d 873 (2000). However, a FOIA requester must describe the material sought with enough particularity so as to apprise the governmental unit what it is being requested to produce. A FOIA requester cannot, in other words, make an ambiguous request and, upon being told that the documents do not exist, file a lawsuit for the purpose of discovering information to utilize in filing a money damage suit against the governmental entity. This is essentially what has happened in this case.

A. No "global readings" could be produced because none existed

Plaintiffs' FOIA request asked for the production of "global readings on the 'extra land'; or global positioning satellite (GPS) readings on the 'extra land'." (**Appellants' Appendix, 102a.**) The City has throughout these proceedings been at a complete loss with regard to Plaintiffs' request. The only basis for such request provided by Plaintiffs is a reference in one of the rough drafts of the Agreement with Sandstone included a scribbled note that a particular provision should have "global" reference throughout the document. However, there is absolutely no evidence of the existence of "global readings" or "GPS" relative to the "extra land." Plaintiffs asked for "Global readings" and/or "GPS" readings. No such documents exist, and Plaintiffs were so advised.

In support of its Motion for Summary Disposition, the City submitted the affidavit signed by Mayor Clark attesting to the fact that there are no such records known to the City. Specifically, Mayor Clark stated:

> Plaintiffs have requested production of "global readings on the 'extra land'; or global positioning satellite (GPS) readings on the 'extra land'". According to a review of City records, there are no such documents utilized by the City negotiators or City Council in connection with the Agreement for Entry of Consent Judgment dated June 25, 2002, or the Consent Judgment entered in connection therewith, and Affiant does not believe that, during the entire course of discussions leading to the Agreement that such global readings on the extra land; or global positioning satellite (GPS) readings on the extra land, were ever discussed or presented to the negotiators of the settlement and/or to the City Council for consideration. **[Appellee's Appendix, 58b-59b]**

Plaintiffs provided no rebuttal in response to the Mayor's affidavit. A failure on the part of the nonmoving party to produce some basis for creating an issue exposes such party to summary disposition in Michigan. When an affidavit, such as the Mayor's in this case, is presented by the moving party, it is incumbent upon the non-moving party to "go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists." *Smith v Globe Life Insurance*, 460 Mich 446, 455; 597 NW2d 28 (1999). *Globe* further clarified that "it is no longer sufficient for plaintiffs to promise to offer factual support for their claims" at some future time. *Id.*

Here, Plaintiffs note that the one page of a rough draft contains the handwritten term "global" and then make a strange leap in logic to the conclusion that some sort of global GPS readings exist. Never mind that the document at issue is a draft of a settlement agreement, and most lawyers would certainly understand and recognize a margin reference in a draft to "global" as suggesting a universal, inclusive, overall, throughout-the-document application of a subject. The conjuring-up of

imaginary notions not recognizable as relating to legal drafting is irrational, and cannot possibly form the basis for a legitimate lawsuit, as Judge Mester and the Court of Appeals readily understood.

In sum, the Affidavit of the City Mayor was sound, good faith evidence that no global readings existed at the City, and Plaintiffs failed to respond with sufficient evidence to create a question of fact on the point. Thus, summary disposition in favor of the City on this issue was properly granted and affirmed.

B. No site plans could be produced because none existed at the time of the FOIA request

Plaintiffs' FOIA request also asked for "any and all site plans from Sandstone regarding the 75 dedicated acres." The text of the Agreement of June 25, 2002, makes no reference whatsoever to the existence of a site plan. While it is certainly contemplated in the Agreement that one or more site plans ***would in the future*** be submitted for the development of the 75 Acres, such site plans were not in the City's possession at the time of the June 25, 2002 Agreement, or at the time of Plaintiffs' FOIA request.

An exhibit to the Agreement includes photographs of various developments from around the City, with the text accompanying such exhibits clarifying that such photographs are to serve as "models" of quality for the ultimate development planned and constructed on the 75 Acres. However, no site plans from Sandstone regarding the 75 Acres were ever submitted to the City, or were otherwise in the custody of the City, at the time Plaintiffs' FOIA request was made (and for months afterward). (The term "site plan" is a term of art in the Agreement, used to refer to formal submission of development plans as required under the City's zoning ordinance, as adopted under the authority of the City and Village Zoning Act, MCL 125.581, *et seq.*)

In support of its Motion for Summary Disposition on this issue, the City again relied on the Affidavit of Mayor Clark, which stated in this regard:

> Plaintiffs have requested production of "any and all site plans from Sandstone regarding the 75 dedicated acres". While it is clearly the understanding and intent of the Agreement that Sandstone, or its successors, would submit site plans in the future, no such site plans for the so-called 75 acres have ever been presented by Sandstone to the City. [**Appellee's Appendix, 58b-59b**]

Plaintiffs failed to provide any basis for questioning or refuting Mayor Clark's affidavit.

The City must briefly address the photographs supplied by Plaintiffs at **Appellants' Appendix, 317a – 318a** and the reference made to them, Plaintiffs' Brief, p 10. The Court of Appeals properly noted in its decision that Plaintiffs' supplying of photographs showing that the 75 acres had been cleared of trees and grading had begun does not support a conclusion that Sandstone filed a site plan with the City. Of equal importance, these photographs are insufficient to show that Sandstone had filed site plans with the City at the time of the FOIA request.

Moreover, and more importantly, although not mentioned by the Court of Appeals, an examination of the photographs on their face reveals (as Plaintiffs well know) that they were **taken in the summer of 2003, well after Plaintiffs' FOIA requests** (see **Appellants' Appendix, 317a – 318a**),[5] and even after the commencement of this case. As addressed in the City's Motion to Limit Record filed with this Court, these photographs were submitted in an unauthorized surrebuttal brief filed by Plaintiffs in the circuit court. The City objected then, and continues to object, in part, because the timing of the photographs means that they could have been offered by Plaintiffs only to create a false impression that a site plan had indeed existed. Accordingly, these photographs depict a circumstance totally inappropriate and irrelevant to the merits of this case, and certainly cannot be used as evidence that site plans existed at the time of Plaintiffs' FOIA request.

[5] As discussed in the City's Motion, Exhibit QQ of the Agreement referred to a post remediation grading plan that would eventually be submitted. The photographs submitted by Plaintiffs depict alterations made to the subject property in accordance with the grading plan that was eventually submitted. After the grading plan was submitted, the City Attorney

Because Plaintiffs failed to provide any factual support to contradict Mayor Clark's affidavit, which clearly states that the City did not have "site plans" to produce in response to Plaintiffs' FOIA request, summary disposition in favor of the City was properly granted.

C. Further discovery on a fishing expedition seeking a basis for subsequent litigation purposes was properly denied in the discretion of the circuit court when Plaintiffs were unable to articulate any legitimate basis for seeking such discovery despite being given a clear opportunity to do so by the circuit court.

1. The court provided Plaintiffs with an opportunity to articulate a reason for the depositions, and no legitimate explanation was given.

In response to Plaintiffs' Notice of Taking Depositions Duces Tecum (see **Appellants' Appendix, 319a-328a**), seeking ten depositions of City officials and demanding production of 85 documents, the City filed a Motion for Protective Order. The motion was presented to the circuit court on August 13, 2003. (**Appellants' Appendix, 471a.**)

At the hearing, the circuit court provided Plaintiffs the opportunity to articulate the reason for such depositions. In response, Plaintiffs made no reference whatsoever to global readings or site plans. Rather, the only reference made by Plaintiffs' counsel was to the so-called "intentionally deleted" exhibits. As clarified above, the issue concerning such exhibits was and is purely a matter of law involving an interpretation of the unambiguous language contained in Plaintiffs' FOIA request.

This Court has clearly pronounced that once a party has filed a motion for summary disposition and supported it with affidavits and documentary evidence, the burden then shifts to the nonmoving party to "go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists." *Globe*, *supra* at 455. This Court in *Globe*, further clarified that "it is no longer sufficient for plaintiffs to promise to offer factual support for their claims" at some future

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invited Plaintiffs' counsel to review the activity on the property. Such subsequent grading activity, however, does not provide evidence that a site plan existed at the time of Plaintiffs' FOIA request.

time. *Id.* Even if discovery is not complete, a plaintiff must provide independent evidence that a factual dispute exists. *Michigan National Bank v Metro Institutional Food Service, Inc*, 198 Mich App 236; 497 NW2d 225 (1993). By way of example, in *Crawford v State*, 208 Mich App 117; 527 NW2d 30 (1994), the Court of Appeals upheld the trial court's grant of summary disposition before the completion of discovery where the defendant had submitted an affidavit in support of the motion and there was no fair chance that the plaintiff could *persuade the affiant to contradict her sworn statement.*

Certainly, discovery should not be precluded where it appears that it will achieve a legitimate purpose. Such a purpose was lacking here. Thus, while Plaintiffs now sing a baseless incantation about a general entitlement to discovery, after providing Plaintiffs with an opportunity to express reasons for the ten depositions, the circuit court rightly excused ten deponents (six of whom are volunteer officials with other jobs and lives) from undergoing burdensome and expensive appearances, particularly in the total absence of any articulated legitimate reason for such exercise.

2. Michigan's discovery rules do not permit "fishing expeditions."

Michigan's discovery rules do not permit "fishing expeditions." This includes the preclusion of discovery to a party opposing a motion for summary disposition. See, *Vanvorous v Burmeister*, 262 Mich App 467, 477; 687 NW2d 132 (2004), citing *In re Estate of Hammond*, 215 Mich App 379, 386-387; 547 NW2d 36 (1996). Our courts have held that allowing discovery on the basis of conjecture would amount to allowing an impermissible fishing expedition. *Id.*

Thus, the law does not contemplate the filing of a case based on mere conjecture, and then using the discovery process to search, after the fact, for making the claim in the first place. This includes cases brought under FOIA.

Nor does FOIA create an elevated entitlement to discovery. In fact, quite the contrary is implicit in the act. MCL 15.240, provides, in part, that "(5) An action commenced under this section and an appeal from an action commenced under this section shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in **every way**." [Emphasis supplied.] The principal policy reasons for the act are noble and unquestioned. A citizenry informed with respect to the workings of government lends important support to the success and fairness in the administration of our system. Likewise, the need to maintain an eye on economic realities must be vigilantly guarded in the interest of persons making requests as well as the interests of public bodies responding to requests. MCL 15.240(5) addresses such concern for economic reality. Implicit in this provision is the intent of the legislature to promote brief and efficient proceedings that do not create an unreasonable burden on either the person requesting information or the public body.

This intent would dictate that discovery, while certainly valid in some FOIA cases, should not cause an open season for litigants to extend the duration and expense of case resolution beyond the point of expeditiousness "**in every way**."

3. A party attempting to use a FOIA action as a vehicle for obtaining discovery for a potential money damage suit is not pursuing the core purpose of the act, and is exploiting the use of public funds for private purpose; thus, at minimum, such a party should not be afforded favorable discretionary relief.

As noted, above, discovery in some FOIA cases may well be justified. Taking into consideration the customary rules applicable to the use of discovery, however, the nature and extent of discovery allowed in a FOIA case—like any other kind of civil case—must be deemed to be within the discretion of the court. *Ensink v Mecosta County General Hospital*, 262 Mich App 518, 687 NW2d 143 (2004) (court did not abuse its discretion for not allowing further discovery where plaintiffs offered nothing other than the speculation that further discovery would produce additional

pertinent information); *Vanvorous v Burmeister*, 262 Mich App 467, 477; 687 NW2d 132 (2004) (appellate court reviews a trial court's decision regarding discovery for an abuse of discretion).

For the reasons recited above, it is clear beyond peradventure that Plaintiffs' attempt to take the depositions of ten City officials, and to compel production of 85 documents (such as Lift Station Easements, Schedule of Public Utility Work, Environmental Standards and Procedure, Conservation Easement for Roads, Pedestrian Walkways and Utilities, Settlement Agreement and Release of Claims between City of Novi and Michigan Municipal Liability and Property Pool, Title Commitments, Minutes of Planning Commission Meetings Relative to the Amendments of the Master Plan, City of Novi Zoning District Map, and many, many more) was not to secure an understanding of the "workings of government." Plaintiffs' intent in noticing the depositions was to scavenge for some basis for a money damage case against the City, an intent that bears nothing in common with the core purpose of the FOIA. Plaintiffs sought to use this FOIA case as a vessel from which to cast nets seeking to uncover some sort of evidence to be used in future damages claims against the City. To Plaintiffs, this FOIA litigation is a pretext to Plaintiffs' desired end—a sizable financial extraction from the City.

Both this Court and the United States Supreme Court have embraced the "core purpose" doctrine in connection with the analysis of privacy exemption cases under the state and federal FOIA. *Mager v Dep't of State Police*, 460 Mich 134, 145; 595 NW2d 142 (1999), *United States Dep't of Justice v Reporters Comm for Freedom of Press,* 489 US 749, 775 (1989). These cases have clarified that the core purpose of the FOIA is **contributing significantly to public understanding of the operations or activities of the government.** This notion has also been referred to as the "central purpose doctrine," and there has been advocacy for expansion of these doctrines. In this regard, it has been observed that, "In a series of cases interpreting [federal privacy]

exemptions, the [United States] Supreme Court and lower federal courts have applied the 'central purpose' test to **exempt a growing scope of information from disclosure under the FOIA**." Cate, Fields, and McBain, *The Right to Privacy and the Public's Right to Know: The "Central Purpose" of the Freedom of Information Act*, 46 Admin. L. Rev 41 (1994) (**Appellee's Appendix, 116b-144b**). [Emphasis supplied].

The City does not advocate a holding by the Court that only information within the core purpose of FOIA must be produced by public bodies under the Act. This could chill the flow of legitimate information and expand the volume of litigation—which is already great. However, where a use of the FOIA clearly fails to fall within the core purpose of the Act—such as an attempt to use FOIA litigation as a vehicle for discovering a basis for a subsequent money damage case—it is respectfully suggested that it would be most appropriate to minimize the potential for abuse.

In this case, the circuit court properly restricted an expansive discovery attempt. Such exercise of discretion is not only consistent with the policy of the core purpose doctrine, it also promotes the "well-established principle of law that public funds may not be used to support a private purpose." Moreover, it represents an appreciation for the point that, "neither the preamble to the FOIA nor its purpose state that it was the intent of the Legislature to surrender publicly-owned property free of charge to private enterprise" (citing Mich.Const.1963, art. 9, § 18). *Kestenbaum v. Michigan State University,* 97 Mich App 5, 22-23; 294 NW2d 228 (1980) (aff'd by evenly divided Supreme Court, 414 Mich 510; 327 NW2d 783 (1982); *cf., Wayne Co. v Hathcock*, 471 Mich 445; 684 NW2d 765 (2004) (involving the exercise of public power for private purposes).

In conclusion, the limitation of discovery in this case was appropriate for good and substantial reasons as a matter of Michigan law, and consistent with public policy implicit in the core purpose doctrine.

III. THE "SIDE LETTERS" AT ISSUE ARE EXEMPT FROM DISCLOSURE UNDER MCL 15.243(1)(f).

Plaintiffs requested production of all documents referred to by Plaintiffs as side agreements (referred to by the City as side letters). There were seven side letters in all. In responding to Plaintiffs' request for such documents, the City produced five of seven side letters. The City's FOIA response recited that:

> The request is denied with regard to two documents representing commercial and/or financial information voluntarily submitted to the City of Novi for use in developing governmental policy in connection with the settlement of Oakland County Circuit Court litigation entitled *Sandstone v City of Novi*, Case No. 95-501532-CK, as contemplated and required under MCL 15.243(f).

MCL 15.243(1)(f), provides that a public body may exempt from disclosure:

> (f) Trade secrets or commercial or financial information voluntarily provided to an agency for use in developing governmental policy if:
>
> (i) The information is submitted upon a promise of confidentiality by the public body.
>
> (ii) The promise of confidentiality is authorized by the chief administrative officer of the public body or by an elected official at the time the promise is made.
>
> (iii) A description of the information is recorded by the public body within a reasonable time after it has been submitted, maintained in a central place within the public body, and made available to a person upon request. This subdivision does not apply to information submitted as required by law or as a condition of receiving a governmental contract, license, or other benefit.[6]

A. The factual setting of this case is extremely important to a proper review by this Court

1. The decision to finalize the Settlement Agreement and Consent Judgment

[6] In describing this exemption in its FOIA response to Plaintiffs, this exemption was listed as MCL 15.243(g) based upon the available text of the Act then available to counsel for the City.

The side letters at issue were exchanged at the time the parties were considering the approval of the Settlement Agreement and the Consent Judgment flowing from the Settlement Agreement. The City was faced with a money judgment, then on appeal, that was more than three times the City's annual general fund budget. If the litigation had been upheld through all appellate courts, the Judgment, with interest accruing at 12%, could have exceeded $100,000,000.00.

If the City were *unsuccessful* in the litigation, the City would have been required to satisfy the Judgment, which would have, in turn, contemplated the issuance of a judgment bond, to be paid for by the assessment of each and every property in the City. The assessment would have constituted a substantial amount (several hundred dollars annually for the average household), and the assessment would have extended over the course of 15 to 20 years. This would have been devastating to many residential property owners.

But it would also have had ramifications beyond imagination on corporations and investors deciding whether to locate office, commercial and industrial facilities within the City, knowing that, in comparison to other competitive venues, tens of thousands—and perhaps hundreds of thousands—of dollars would have to be expended just to pay this Judgment incurred in the past. The side letters clearly facilitated the Settlement Agreement and Consent Judgment. In this regard, the side letters directly affected what was probably the most significant policy decision ever made in the City of Novi.

2. The City's decision on attempting to clear the deed restriction claim

It was important for the City to clear the deed restriction issue described in the Counter Statement of Facts and set forth in the Settlement Agreement between the City and Sandstone. The penalty for failing to clear the deed restriction issue in some manner was the public loss of several acres of additional land set aside for public use, as explained in the Settlement Agreement.

Obviously, keeping that land was a serious concern for the City and its residents. In addition, under the Settlement Agreement, if Sandstone acquired the land now owned by Plaintiffs in this case, Sandstone would be permitted to develop such land in the same manner as the adjoining 75 Acres. Thus, Sandstone desired the City to purchase the Plaintiffs' properties, which would clear the deed restriction issue and allow a sale of additional development property to Sandstone.

Of course, expending the money to actually purchase Plaintiffs' properties (and other nearby properties) represented only one of several means to address the alleged deed restriction issue. Alternative courses that could have been pursued by the City included purchasing the properties in fee, purchasing a waiver of the right of enforcing the claimed restriction, and commencing a declaratory judgment action to secure a judgment declaring that Plaintiffs and the others did not have the right to enforce the restriction.

Sandstone wanted to provide an inducement to the City to purchase the properties in fee by offering to advance all or part of the money for such purpose. Such offer by Sandstone included the exact amount Sandstone would pay for the respective properties. **This is the information reflected in the two withheld side letters. Naturally, submission of such information to the City was expressly conditioned upon the promise of the City that this financial information would remain confidential.**

As events unfolded, the City did not follow up on Sandstone's proposal for an outright City purchase of Plaintiffs' properties. Instead, the City restricted its attempted purchase from Plaintiffs to a waiver of the right of enforcing the claimed restriction. This decision was made after the Settlement Agreement had been reached, and after the side letters had been submitted. Nonetheless, the City's determination not to attempt an outright purchase would not alter Sandstone's ultimate interest in purchasing Plaintiffs' properties for development purposes. Thus, the side letters continue

to contain confidential facts of some significance to Sandstone. The incentive for Sandstone to directly negotiate with Plaintiffs (or others) for the purchase of their properties for development purposes remained intact. This, in turn, would lead to prospective negotiations on what Sandstone would be willing to pay to Plaintiffs for such properties. It is these anticipated future negotiations on price that renders the two side letters of such important financial proprietary interest, since they disclose the exact amount that Sandstone would be willing to pay for Plaintiffs' (and others') respective properties.

B. The City complied with MCL 15.243(1)(f)

An examination of the two side letters in light of the facts and arguments presented by the parties reveals, as the circuit court and Court of Appeals properly held, that the City complied with each of the requirements of MCL 15.243(1)(f), and that disclosure of the two side letters would therefore be inappropriate.

Under the specific language of the statutory provision, to be exempt, the record must (1) be a trade secret or commercial or financial information voluntarily provided to the City; (2) that is used in developing governmental policy; (3) the information must be submitted upon a promise of confidentiality authorized by the chief administrative officer or an elected official of the public body; and (4) a description of the information must be recorded by the public body, maintained in a central place, and made available to a person upon request. Applying the relevant portions of *Evening News Ass'n v City of Troy*, 417 Mich 481; 339 NW2d 421 (1983), and *Nicita v City of Detroit*, 216 Mich App 746; 550 NW2d 268 (1996), the following guide applies in analyzing the exemption in this case: (1) the burden of proof is on the party claiming the exemption; (2) exemptions must be interpreted narrowly; (3) the public body shall separate the exempt and nonexempt material and make the nonexempt material available to examination and copying; (4)

detailed affidavits describing the matters withheld must be supplied; (5) justification of exemption must be more than conclusory, i.e., more than a simple repetition of statutory language; and (6) the relationship between the commercial or financial information and the development of governmental policy must be shown. Each of these standards was applied by the Circuit Court and Court of Appeals in favor of the City.

- **Commercial or financial information voluntarily provided to the City**

There can be no question that the pursuit of the purchase of land, and particularly the land of Plaintiffs and others in the area, would amount to commercial activity for Sandstone, a land development company. The side letters contain specific financial information relating to the price Sandstone would be willing to pay for the purchase of the properties—properties for which Sandstone could reasonably be expected to negotiate in the future. This information goes to the essence of proprietary information of a land developer. Because the Settlement Agreement placed duties on the City, this information also related to financial information greatly affecting the City and future actions of the City. The letters were voluntarily provided to the City as information relevant to the City in its deliberations concerning how to clear the deed restriction claims. Moreover, the letters were provided to the City as an inducement for the City to proceed with the Settlement Agreement obligation to clear up the deed restriction issue within six month in order to conform with timing concerns applicable to substantially all developers. The letters were voluntarily provided.

- **Information for use in developing governmental policy**

There were two governmental policies at issue at the time of the creation of the side letters: the avoidance of bankruptcy by the City and the consideration of the manner in which the City should attempt to clear the deed restriction claim so as to avoid the loss of significant park property.

1. **The avoidance of bankruptcy**

The side letters were exchanged at the time the parties were considering the approval of the Settlement Agreement and Consent Judgment, settling a multi-million dollar Judgment against the City that was more than three times the City's general fund budget—the funds that the City uses to supply police and fire protection and all other general services throughout the City. If settlement had not occurred and the Judgment was affirmed on appeal, it might well have accumulated to more than $100 million. This event would have bankrupted the City, and required a substantial assessment on each and every property in the City over a period of 15 to 20 years. Therefore, in facilitating the overall settlement, the side letters impacted one of the most significant policies ever deliberated in this or any City.

2. **Manner in which the deed restriction clearance would be pursued.**

As noted, above, the City had several alternative means by which to pursue a clearing of the deed restriction claim. At stake was the obligation to convey several acres of additional land to Sandstone. Deliberations on this issue required the weighing of several factors, including the very limited time available to pursue the restriction clearance, the amount of money available to the City in relation to the cost of each alternative, the complex legal aspects associated with each alternative, the anticipated response of the property owners, and the relative uncertainties of each alternative.

The City's deliberations on the deed restriction issue were complex and the decision about whether or how to proceed had at stake two factors of City-wide magnitude. First, the deliberations would affect the availability of several acres of land required to be conveyed to Sandstone depending on the outcome of the City's pursuit to clear the deed restriction issue. Such acreage would, if retained, be available to the entire City for park purposes. Second, the deliberations involved the potential expenditure of hundreds of thousands of dollars. Because the amount of money at stake

represented a material portion of the City's budget, a decision to make such an appropriation would, of necessity, impact the provision of important City services, including police, fire, and the like.

In sum, deliberations on whether to proceed, and how to proceed, relative to the removal of the deed restriction claim—the precise subject matter of the two side letters—amounted to complex City policy of significant magnitude. The circuit court and Court of Appeals recognized this and properly found that the letters contained information for use in developing governmental policy.

Plaintiffs contend that the Court of Appeals decision directly conflicts with the decision in *Herald Company Inc v Grand Rapids Press*, 258 Mich App 78; 669 NW2d 862 (2003). This argument is completely misguided and without merit. *Herald Company* involved a *single taxpayer's tax assessment challenge*. The Michigan Tax Tribunal asserted that the FOIA, MCL 15.243(1)(f), discharged it from holding open meetings under the Open Meetings Act involving the tax assessment challenge. The Court of Appeals disagreed, finding that a tax assessment challenge is simply a tax determination involving a single taxpayer, lacking the policy-making contemplated by the Legislature in drafting the exemption. *Id.*

Plaintiffs' misconception is that the side letters at issue concern information relating only to Plaintiffs' property. While the letters do contain information regarding Plaintiffs' properties and how much Sandstone was willing to pay for their properties, this function of the side letters literally affected the financial well being of the entire City, and concurrently weighed upon whether the City would lose several additional acres of public land to Sandstone.

The City notes that because the Open Meetings Act ("OMA") and the FOIA were adopted at approximately the same time, and have the same general purpose, they must be read together when possible. In *City of Detroit v Michigan Bell Telephone Company*, 374 Mich 543, 558; 132 NW2d 660 (1965), the Court clarified that:

> Our conclusion is that both acts must be construed together as statutes in pari materia, for reasons which follow.
>
> Statutes in *pari materia* are those which relate to the same person or thing, or the same class of persons or things, or which have a common purpose. It is the rule that in construction of a particular statute, or in the interpretation of its provisions, all statutes relating to the same subject, or having the same general purpose, should be read in connection with it, as together constituting one law, although enacted at different times, and containing no reference one to the other. (Emphasis supplied)

The OMA, MCL 15.263, provides that all decisions of a public body must be made at an open meeting. A meeting is defined as the convening of a public body at which a quorum is present **for the purpose of deliberating toward or rendering a decision on public policy**. MCL 15.262(b). A decision is "a determination, action, vote, or disposition upon a motion, proposal, recommendation, resolution, order, ordinance, bill or measure on which a vote by members of a public body is required and by which a public body effectuates or formulates public policy. " MCL 15.262(d). The OMA does not specifically define "public policy," but case law interpreting the OMA defines the term "public policy" very broadly.

For example, in *People v Whitney*, 228 Mich App 230; 578 NW2d 329 (1998), the Court of Appeals found that the decision by three members of a city council at a closed session to return to open session of the council to vote to pass motions to remove a person from administrative leave, to return him to his position as city manager, and to end another person's service as temporary city manager, constituted a "decision" on a matter of public policy that should have been made at an open meeting. Clearly, even though the matter touched only one person's job as city manager, the Court found that the matter concerned public policy. Thus, when dealing with trade secrets or commercial or financial information used in developing governmental policy, the term "policy" should be construed consistent with the interpretation of such term under the OMA.

Even looking at the definition of "policy," the information in the side letters falls within the FOIA exemption. *Webster's New Riverside Dictionary*, p 529, defines "policy" as "a principle or course of action chosen to guide decision making" or "prudent management." This precisely describes the information contained in the side letters.

Plaintiffs are correct when they state that the FOIA is a pro-disclosure statute and that the exemptions are narrowly construed. However, Plaintiffs are again completely misguided when they assert that as a result of the Court of Appeals' decision in this case it is now unclear what constitutes "development of governmental policy" under the FOIA. FOIA cases are by nature very fact-specific. The FOIA has a similar purpose as the Open Meetings Act (OMA), which is "manifesting this state's policy favoring public access to government information." See *Herald Company*, *supra*. However, the Legislature has determined that information cannot be required to be disclosed if it will hinder the formulation of government policy or the workings of government.

Interpreting governmental policy to include the information at issue in this case by no means requires a broad interpretation of either the confidentiality exemption or the term "policy." If the information at issue is not interpreted to be used for "governmental policy," the courts would be hard-pressed to interpret ***any*** information as being used for "governmental policy." The side letters at issue directly related to the formulation of critical governmental policy in the City of Novi.

- **Submission of letters upon a promise of confidentiality**

The side letter specifically containing the information on the amount Sandstone was willing to pay for each of the several properties includes a provision that the terms of the letter are confidential under all respects. Nothing could be clearer. The second letter, by its nature, is inseparable from the first letter and, thus, is confidential. The Affidavit of Ronald Hughes clearly states that the information is confidential and that confidentiality was assured by the City through the

Mayor and the City Manager (**Appellee's Appendix, 105b-107b**). Mr. Hughes' affidavit clearly states that the information would not have been provided if confidentiality had not been assured.

Plaintiffs cite a quote from the City Attorney in which he stated " in view of what appeared to be the confidential nature of certain side letters, I attempted to work out an agreeable arrangement . . ." Plaintiffs argue this statement is proof that the letters were not submitted upon a promise of confidentiality. Plaintiffs however, take this statement out of context. What must be considered is the time at which the letters were submitted. At that time, both Sandstone and the City officials viewed the information as confidential. As reflected in **Appellee's Appendix 12b-13b**, Sandstone took the initial position that ***all seven*** side letters were exempt under FOIA. Thus, what is important is that the letters were submitted upon a promise of confidentiality, and met all other requisites of MCL 15.243(1)(f). Ronald Hughes' affidavit is proof that the letters were submitted upon a promise of confidentiality, and Plaintiffs failed to refute this affidavit with any evidence to the contrary.

- **Confidentiality promised by the chief administrative officer or elected official at the time the promise of confidentiality was made**

There were seven side letters initially at issue. For the most part, these letters, including one of the two side letters at issue, involved an exchange actually signed by Sandstone's representative and the duty-elected Mayor of the City. The side letters were part of the final discussions and the understanding reached. They were examined by the City Council in executive session (conducted to deliberate on the settlement of pending litigation). Both the Mayor of the City and the Chief Administrative Officer of the City (the City Manager) were involved in the dialogue on the side letters, including the express confidentiality statement that then facilitated the Settlement Agreement to move forward. Sandstone's Ronald Hughes averred that the letters were submitted upon a promise of confidentiality of the Mayor and City Manager. Plaintiffs cannot refute that the Mayor and City Manager are an elected official and the "chief administrative officer" of the City,

respectively. Plaintiffs' argument that neither the Mayor nor the City Manager could authorize or did authorize the promise of confidentiality is simply inconsistent with the language of the statute.

- **A description of the information exempted on file at the City**

MCL 15.243(1)(f) provides that "a description of the information is recorded by the public body within a reasonable time after it has been submitted, maintained in a central place within the public body, and made available to a person upon request." The Affidavit of Maryanne Cornelius, Clerk of the City of Novi, clearly shows that a description of the information was recorded, entitled "SETTLEMENT IN OAKLAND COUNTY CIRCUIT COURT LITIGATION WITH SANDSTONE, DESCRIPTION OF INFORMATION PROVIDED TO CITY UPON PROMISE OF CONFIDENTIALITY PURSUANT TO MCL 15.243(g) [now codified as MCL 15.243(f)] and has been maintained in the Clerk's office since November 26, 2002. (**Appellants' Appendix, 489a-494a**.)

There is nothing in the FOIA provision that defines what a "reasonable" time is—and properly so within this context. As properly construed by the circuit court and Court of Appeals, whether the time frame was reasonable by necessity depends upon the circumstances of the case and is very fact-specific. The record clearly shows that in this case, Sandstone considered all of the side letters to be confidential and prohibited from disclosure. This does not mean, however, that all such letters were exempt under the FOIA. Even after the Settlement Agreement and the Consent Judgment were entered into, Sandstone and the City continued to negotiate various aspects of the respective parties' duties and obligations. The City Attorney had to negotiate extensively with Sandstone to have five out of the seven letters disclosed.

The record contains evidence of correspondence between Sandstone and the City attorney, including letters and e-mails (see, e.g., **Appellants' Appendix, 485a**) concerning the disclosure of

the side letters. It is clear that had the City immediately placed on file a description of all the letters deemed to be exempt *before* the negotiations on document release were completed, it would have resulted in the withholding of ***all seven*** side letters based upon Sandstone's initial position on this subject. Thus, documents would have been needlessly withheld, a result this is obviously contrary to the purpose of the FOIA.

Counsel for the City worked expeditiously to resolve with Sandstone the delicate matter of releasing confidential side letters. The circuit court and Court of Appeals recognized this and properly held that the time frame was reasonable within this factual context. Plaintiffs would like this Court to believe that a settlement was entered into in June, 2002, and then nothing happened until Plaintiffs made their FOIA request five months later. As the record demonstrates, that is not what occurred.

Moreover, regardless of the timeframe in which a description of the information was put on file, Plaintiffs clearly suffered no prejudice. City Clerk Maryanne Cornelius' affidavit clearly reveals that no one had requested the information before it was actually placed on file in the Clerk's office, and no one has requested the information since. Plaintiffs were clearly aware of the side letters, as they asked for the letters in the FOIA request.

C. The circuit court findings were made with sufficient particularity

There are several types of exemptions from the disclosure requirements under FOIA specified in MCL 15.243. Each exemption analysis must be related to the particular exemption at issue. In this case, the statutory requirements under MCL 15.243(1)(f) are set forth above. Each of the requirements has been demonstrated to have been met, and these side letters are precisely the type of information for which the FOIA provides exemption.

Plaintiffs claim that the City failed to offer particularized reasons for the denial of Plaintiffs' FOIA request. However, it has been made clear throughout this argument that the City did in fact give Plaintiffs particularized reasons for the denial and also provided sworn, particularized evidence to the circuit court supporting the denial.

In *Evening News*, *supra*, this Court analyzed the procedure for judicial review under the "law enforcement" exemption set forth in the FOIA. The Court provided a framework for the review and resolution of that specific exemption. While the methodology and issues involved in the review of that exemption will not be precisely the same as the methodology and issues with reference to the review of a confidentiality exemption, the court's thought process translated well enough.

Plaintiffs argue that the trial court failed to make particularized findings in determining that the side letters fell within the FOIA exemption. In turn, Plaintiffs argue that the Court of Appeals likewise failed to make particularized findings and erred in affirming the trial court's decision. Plaintiffs' argument is wholly without merit.

First, the Court must look at the agency—in this case, the City—to ascertain whether it presented a particularized justification for the exemption. In connection with the *in camera* review hearing, the City submitted a detailed memorandum to the trial court accompanied by affidavits supporting its contents and outlining a complete justification for the exemption of the side letters corresponding to the particular requirements of MCL 15.240(1)(f). At the hearing, the City argued specifically why the side letters were exempt (see **Appellants' Appendix, 345a-370a**). The record in this case is replete with exhibits fully and completely demonstrating the City's conformance with the statutes exemption requirements.

It is also relevant to examine the circuit court's determination whether particularized justification existed. Following the hearing, the Court expressly and particularly found in a written

opinion that the letters contained financial or commercial information that Sandstone voluntarily provided to the City in confidence. The court further found that the letters fell within the policy-making potential contemplated by the Legislature, as they were intended to facilitate the Settlement Agreement and Consent Judgment and to assist the City in making policy decisions with regard to carrying out its duties under the Settlement. The court found that the content of the side letters related to the City's deliberations on the selection of the best government policy for the expenditure of substantial sums of money and the retention of land for public use (**Appellants' Appendix, 5a-6a**). These findings were sufficient and particularized.

The Court of Appeals likewise made a determination that particularized justification existed. The Court of Appeals found that the information in the letters clearly concerned public policy, as it related to how the City intended to settle the Sandstone litigation, which settlement had the potential to bankrupt the City and seriously impact the City's residents. The court further found that Plaintiffs failed to offer any evidence to controvert the proofs presented by the City establishing that the letters were submitted by Sandstone upon a promise of confidentiality authorized by the City's mayor. The court found that the City had placed a description of the side letters on file in a central location after Plaintiffs' FOIA request, and determined that the time frame was reasonable because, due to questions regarding deed restrictions on the property transferred, the City and Sandstone continued to negotiate after the time the Settlement Agreement was entered on June 25, 2002.

Accordingly, the lower courts found with sufficient particularity that the City met all of the requirements set forth in MCL 15.243(1)(f). Clearly, Plaintiffs are attempting to raise red flags where none exist. The confidentiality exemption duly applies to the two side letters at issue.

IV. IN LIGHT OF THE ISSUES OF CONFIDENTIALITY THAT HAD TO BE RESOLVED USING THE SERVICES OF THE CITY ATTORNEY PARTICULARLY RELATING TO RELEASE ANY OF THE SO-CALLED "SIDE LETTERS," THE CITY PROPERLY CHARGED PLAINTIFFS A FEE ON THE BASIS THAT SUCH SERVICES COULD NOT BE PERFORMED BY ANY PERSON WHO WOULD BE COMPENSATED AT A LOWER RATE

In reviewing the issue of fees in this case, the Court should bear in mind the fact that the City turned over hundreds of records, possibly thousands of pages, to Plaintiffs when asked—all free of charge. Plaintiffs dispute the $150 fee that the circuit court and Court of Appeals found appropriate for the City Attorney's work in achieving a separation of exempt from nonexempt materials so as to enable the release of five of seven of the side letters.

The $150 charge was not an "attorney fee" as such. This was a fee properly charged for answering Plaintiffs' FOIA request. Our courts recognize that the general legislative scheme is to allow the public body to recover its reasonable and actual costs in complying with a FOIA request, no more and no less. *Tallman v Cheboygan Area Schools*, 183 Mich App 123, 130; 545 NW2d 171 (1990).

MCL 15.234 provides in pertinent part:

> (1) A public body may charge a fee for a public record search, the necessary copying of a public record for inspection, or for providing a copy of a public record. Subject to subsections (3) and (4), the fee shall be limited to actual mailing costs, and to the actual incremental cost of duplication or publication including labor, the cost of search, examination, review, and the deletion and ***separation of exempt from nonexempt information*** as provided in section 14. . . .
>
> * * *
>
> (3) In calculating the cost of labor incurred in duplication and mailing and the cost of examination, review, separation, and deletion under subsection (1), a public body may not charge more than the hourly wage of the lowest paid public body employee capable of retrieving the information necessary

> to comply with a request under this act . . . (emphasis supplied).

In the City of Novi, the position of City Attorney, just like the positions of City Clerk and City Manager, is established in the City Charter. Section 4.10 of the City Charter, provided as **Appellee's Appendix 108b-115b**, provides for the City Attorney to be appointed by the Council and to hold office at the pleasure of the Council. This section also establishes the functions, duties, and compensation of the City Attorney.

Plaintiffs claim that, had the information been placed in a centrally-located file, such a fee would not have been necessarily incurred by the City attorney. However, in taking this position, Plaintiffs ignore the fact that all seven of the side letters would have been included as exempt. The process of reducing the coverage of the exemption—i.e., the effort to work out with Sandstone the exempt from nonexempt side letters—required involvement by the City Attorney. Indeed, the City attorney was the only person on the City's staff who could address this matter with Sandstone and separate the exempt material.

Within the context of this case, the City Attorney's duties, while working for the City, included consulting with Sandstone concerning the disclosure of the side letters, which in turn required the precise function recognized in the FOIA of separating exempt and nonexempt material. Because Sandstone took the initial position that all side letters requested by Plaintiffs were confidential, the City Attorney was mandated to become more actively involved, successfully resulting in the disclosure of all but the two withheld side letters. Had the City Attorney not become involved, the likely consequence would have been that, at the end of the day, Plaintiffs would have received substantially fewer records. Thus, the City Attorney involvement was necessary and appropriate.

Plaintiffs suggest that the City Attorney in Novi does not qualify under the statute. The Court can take judicial notice of the fact that every city in Michigan has a city attorney. Some are "in-house" officials, but *most* function on a contract basis. Certainly it may not be concluded that, when crucial legal issues arise under the FOIA, only "in-house" city attorneys are permitted to become involved. Compare the City Attorney's prosecutorial duties as analyzed for purposes of governmental immunity, and the conclusion that the City Attorney qualifies under the FOIA is obvious.

Accordingly, contrary to Plaintiffs' argument, the fee charged was not an "attorney fee." The fee charged was a fee necessary to review and separate the exempt material from the non-exempt material, and it was minimal in amount. Clearly, it is authorized by the FOIA.

V. A CITY ATTORNEY, WHETHER "IN-HOUSE" OR RETAINED, IS AN EMPLOYEE OF A PUBLIC BODY FOR PURPOSES OF MCL 15.234.

Plaintiffs argue that the lower courts should have applied the "economic reality test" to find that the City Attorney is not an employee for purposes of the FOIA. Plaintiffs provide no rational basis why the two legislative schemes – disparate in both subject matter and purpose—should be read together, and no such basis exists.

The "economic reality test" is the former test used to determine whether an individual is an employee or an independent contractor ***for purposes of the Worker's Compensation Disability Act*** (**WCDA**). The term employee is now defined in the WCDA at MCL 418.161. The primary purpose of the WCDA is to provide benefits to the victims of work-related injuries by allocating the burden of payment to the employer and, ultimately, the consumers. *Eversman v Concrete Cutting & Breaking*, 463 Mich 86; 614 NW2d 862 (2000). An employee must be distinguished from an independent contractor so that the individual can receive compensation from only one source. The policy behind the WCDA is completely different from that at work in the FOIA.

The term "employee" is not specifically defined in the FOIA. The Court of Appeals properly noted that unless expressly defined in a statute, every word or phrase should be given its plain and ordinary meaning, taking into account the context of the statute. See *Ryant v Cleveland Twp*, 239 Mich App 430, 433; 608 NW2d 101 (2000); see also *Halloran v Bhan*, 470 Mich 572, 576; 683 NW2d 129 (2004). The court properly consulted a dictionary to determine the plain meaning of "employee" and determined that the *Random House Webster's College Dictionary* (1992) defines employee as "a person who has been hired to work for another." Based on this definition, the court found that the City Attorney was the City's employee for purposes of MCL 15.234. This finding was proper. Plaintiffs fail to argue why the totally unrelated "economic reality test" should be applied rather than the ordinary meaning in the context of the FOIA.

Plaintiffs contend that the Court of Appeals' decision in this matter will have negative ramifications. According to Plaintiffs, any governmental entity can now charge attorney fees for responding to FOIA requests, and this would severely limit those citizens who could not afford to pay the fees from accessing information. Further, according to Plaintiffs, any attorney who works on a FOIA case can now be construed to be an employee of the governmental entity. Plaintiffs make these bold assertions completely ignoring that each and every assessment of fees under FOIA requires a fact-based review.

In the present rare case, there were multiple documents that had the character of confidentiality due to the unique circumstances at issue. Moreover, the confidentiality had great sums of money at stake, resulting in a hard position on the part of Sandstone. This alignment of facts and circumstances will only infrequently occur, and, even when it does, may be subject to resolution very easily and quickly. This case represents the far "outlier" from the norm in terms of

the requirement for more extensive City Attorney involvement, and should not be used as a basis setting policy for customary usage.

The lower court decisions authorizing the fees charged achieve fairness and equity within the textual framework of the statute, and should be affirmed.

CONCLUSION AND RELIEF SOUGHT

Plaintiffs' FOIA case, in essence, is an attempt to exploit a legitimate tool designed to facilitate citizen oversight of public affairs. The City cooperated with Plaintiffs to the extent feasible. In concluding that the City's denials of information were proper, the lower courts remained obedient to the purposes and applicable provisions of FOIA. The facts and circumstances presented in this case, and the FOIA jurisprudence of the State, command affirmance of the decisions of the lower courts.

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